CHEW AH KAU & ANOR

v.

KENN KENN HOLDINGS SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CIVIL SUIT NO. F 22-16-86]
22 DECEMBER 1986

CIVIL PROCEDURE: *Interlocutory application to strike out statement of claim - Under O. 18 r. 19(1)(b), (d), O. 92 r. 4 of the Rules of the High Court 1980 - Locus standi - Whether this application is a proper one to which O. 18 r. 19(1)(b), (d) should apply.*

The plaintiffs seek to declare themselves the beneficial owners of 2 pieces of property pursuant to a deed of assignment dated 29 April 1980 created by the 1st defendant in their favour. They also seek to declare an earlier assignment of the same property dated 24 July 1978 executed by the 1st defendant in favour of the 3rd defendant null and void.

In this interlocutory application, the 3rd defendant seeks to strike out the statement of claim under O. 18 r. 19(1)(b) and (d) of the Rules of the High Court 1980. The 3rd defendant also seeks to remove the private caveat lodged by the plaintiffs over one piece of the property.

Held:
As the matter of the plaintiffs' *locus standi* is still pending before the Supreme Court, and since there are issues of law and facts raised in this application therefore this application is not a proper one to which O. 18 r. 19(1)(b) and (d) should apply and to that extent, the application is dismissed with costs. It is further ordered that the caveat lodged by the plaintiffs over one piece of the land to remain until the determination of this suit.

[Application dismissed with costs.]

Case referred to:
Nouvau Mont Dor (M) Sdn. Bhd. v. Faber Dev. Sdn. Bhd. [1985] CLJ (Rep) 231

Legislation referred to:
Civil Law Act 1956, s. 4(3)
Rules of the High Court 1980, O.18 r. 19(1)(b), (d), O. 92, r. 4

For the 3rd defendant/applicant - J. Doshi; M/s. Tunku Zuhri, Manan & Abdullah
For the plaintiffs/respondents - P.S. Gill; M/s. Gill & Tang

JUDGMENT

Siti Norma Yaakob J:

In this action, the plaintiffs seek to declare themselves the beneficial owners of 2 pieces of property pursuant to a deed of assignment dated 29 April 1980 created by the first defendant in their favour. They also seek to declare an earlier assignment of the same property dated 24 July 1978 executed by first defendant in favour of the third defendant null and void.

In the interlocutory application before me, the third defendant seeks to strike out the statement of claim under O. 18 r. 19(1)(b) and (d) and under O. 92 r. 4 of the Rules of the High Court based on the following 2 grounds.

(1) That the assignment created by the first defendant in its favour is an absolute assignment under s. 4(3) of the Civil Law Act 1956.

(2) As the assignment was made earlier in point of time to the one granted by the first defendant to the plaintiffs, it has a prior right to the beneficial interest in the property.

To that end, it also seeks to remove the private caveat lodged by the plaintiffs over one piece of the property.

It is not disputed that the third defendant derived an interest to the property as a result of the loan and overdraft facilities it had extended to the first defendant and for the purpose of securing such facilities, it had accepted an assignment of all the rights the first defendant had over the property. Now what rights has the third defendant derived from this assignment? Is it an absolute assignment for which the third defendant's interest in the property would be that of a beneficial owner or is the interest limited only to the amount of the credit and overdraft facilities, in which case, its interest on the property is that of a chargee only. To determine this, the Federal Court in *Nouvau Mont Dor (M) Sdn. Bhd. v. Faber Dev. Sdn. Bhd.* [1985] CLJ (Rep) 231 has held that "whether or not an assignment is an absolute one (not purporting to be by way of charge only) within the meaning of s. 4(3) of the Civil Law Act 1956 is to be gathered only from the 4 corners of the instrument itself". A perusal of the assignment dated 24 July 1978, particularly Clause 4 shows that the assignment was necessary as there was no separate issue of document of title over the property and that the first defendant undertook upon the issue of such document of tile to have the property transferred into its name and then execute a charge in favour of the third defendant and upon registration of such a charge, the assignment will have no legal force or effect. Clause 4 clearly states out the parties' intention that the assignment was never meant to be an absolute one but that it was only a charge on the loan to secure the credit and overdraft facilities extended by the third defendant to the first defendant.

As to the question of priorities, this must depend on whether the plaintiffs were *bona fide* purchasers for value without notice. It is not disputed that the third defendant had not lodged a lien holder's caveat over the property as it had assumed all along that the assignment created in its favour was an absolute one and moreover it could not do so as no issue document of title were deposited with it. This brings me to consider the plaintiffs' contention that in 1971 and 1973, two separate titles were issued over the property. The third defendant questions these two titles on the ground that they do not relate to the property in question.

The total land area of the 2 pieces of property is 1540 square feet and it is clear from the pleadings that a separate document of title for one piece of the property comprising 592 square feet was issued on 26 March 1973 under H.S.(D) 37135 Lot 25991 Mukim of Kuala Lumpur, the very same piece that have been caveated by the plaintiffs on 31 June 1980. The remaining area comprising of 948 square feet is still part of a bigger lot of land held under H.S.(D) 20039 for lot 1180 in the Mukim of Kuala Lumpur, the title of which was issued on 22 June 1971, but has yet to be sub-divided. Both titles are still registered in the name of the 2nd defendant. The deed of assignment dated 24 July 1978 whilst identifying lot 25991 as one piece of the property also identifies the remaining piece as lot 1180C whilst the exhibited copy of the remaining lot is referred to as lot 1180. I also notice that although the plaintiffs had caveated lot 25991, the endorsement of such a caveat does not appear in the exhibited copy of the title. As particulars of the property itself are in dispute, these can only be determined by oral evidence from the land authorities as to the state of the titles in question.

From the affidavits too there had been earlier proceedings between the same parties over the property. It started in the Sessions Court where Equatron (Marketing) Sdn. Bhd., a judgment creditor in attempting to execute a judgment debt obtained against the first defendant

obtained a prohibitory order over the same property. In subsequent proceedings, the third defendant applied to set aside the prohibitory order over which the Sessions Court allowed. The judgment creditor appealed, and Razak J allowed the appeal and ordered the sale of the property and the proceeds to be utilized first towards the discharge of any remaining loan or liabilities due to the third defendant and the balance towards the discharge the judgment debt due to the judgment creditor. That was in October 1983.

The property was scheduled to be auctioned on 24 January 1986 but 2 days before that and before Harun J, the plaintiffs succeeded in their application to intervene and to stop the auction from proceeding but the Judge also ordered that the plaintiffs file a claim within one week to determine their rights, title and interest in the property. The plaintiffs did so within the time limited and that claim is the present suit before me. However, on the subsequent application by the third defendant on 12 March 1986, Harun J set aside the *ex parte* order he made on 21 January 1986. The plaintiffs have appealed against such an order to the Supreme Court.

Following the order made by Harun J on 12 March 1986, the third defendant has also questioned the right of the plaintiffs to proceed with this suit even though it was filed within the time limited for filing. As the matter of the plaintiffs' *locus standi* is still pending before the Supreme Court, I had also borne this factor in mind and since there are issues of law and facts raised in this application, I had considered that his application is not a proper one to which O. 18 r. 19(1)(b) and (d) should apply and to that extent, dismissed the application with costs and ordered that the caveat lodged by the plaintiffs over one piece of the land to remain until the determination of this suit.

Also found at [1987] 2 CLJ 319